Not To Be Published:

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

SUMMER N. DEAKINS, Plaintiff, vs. JO ANNE B. BARNHART, Commissioner of Social Security, Defendant.	No. C02-4054-MWB **MEMORANDUM OPINION AND ORDER REGARDING DEAKINS'S OBJECTIONS TO MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION**

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I. INTRODUCTION

This is an action for judicial review of the denial by the Social Security Administration ("SSA") of plaintiff Summer N. Deakins's ("Deakins") application for supplemental security income disability benefits. Deakins contends that she suffers from a disability, within the meaning of the Social Security Act, owing to a history of attention deficit hyperactivity disorder, mood disorder, bi-polar disorder, borderline personality disorder, learning disorder with an IQ of 79, and Russell-Silver Syndrome, myoclonic jerking, or uncontrolled tics with an onset date of January 1, 1987. (R. at 89-91, 139, 149, 225-28, 239). However, an administrative law judge ("ALJ") for the SSA reached a contrary conclusion and denied Deakins's application for benefits. The ALJ's decision was affirmed through the administrative appeals process prompting Deakins to file the present action for judicial review on March 17, 2000.

This matter is now before the court pursuant to the May 29, 2003, Report and Recommendation by United States Magistrate Judge Paul A. Zoss concerning disposition of this matter and Deakins's June 9, 2003, objections to that Report and Recommendation. In his Report and Recommendation, Judge Zoss concluded that the ALJ's credibility determination was supported by substantial evidence in the record, that the ALJ did not abuse her discretion when she discounted the opinions of a neurologist who saw Deakins one time, and that the ALJ included in her hypothetical question all of the limitations the ALJ believed to be credible. Judge Zoss, therefore, recommended that judgment enter in favor of the Commissioner and against Deakins. Deakins appears to assert only four objections but there are several objections included in the body of her Objections to the Report and Recommendation. Deakins contends, first, that Judge Zoss incorrectly found in his Report and Recommendation that the ALJ did not confuse Drs. Purves and Legarda, but simply chose to give more credit to Dr. Legarda's opinions. Second, Deakins contends that Judge Zoss incorrectly determined that Dr. Purves was not qualified to opine on Deakins's

intellectual functioning and psychiatric condition. Third, Deakins contends that Judge Zoss incorrectly considered Dr. Brown's "75/40," marked under axis V, as support for the ALJ's determination of residual functional capacity. Fourth, Deakins contends that Judge Zoss incorrectly concluded that the ALJ was entitled to consider her personal observations of the plaintiff's demeanor in making a credibility determination. Next, Deakins contends that Judge Zoss in his Report and Recommendation incorrectly determined that it was appropriate for the ALJ to consider Deakins's testimony regarding her daily activities as part of the *Polaski* analysis. Finally, Deakins asserts that Judge Zoss incorrectly concluded in the Report and Recommendation that there is nothing in the record to support a claim that boredom or a short attention span, in the circumstances of this case, would be disabling. Contrary to Judge Zoss's recommendation, Deakins requests that this court find that she is eligible for benefits.

II. LEGAL ANALYSIS

A. Standards Of Review

The standard of review to be applied by the district court to a report and recommendation of a magistrate judge is established by statute:

> A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate [judge].

28 U.S.C. § 636(b)(1). The Eighth Circuit Court of Appeals has repeatedly held that it is reversible error for the district court to fail to conduct a *de novo* review of a magistrate judge's report where such review is required. *See, e.g., Hosna v. Groose*, 80 F.3d 298, 306 (8th Cir.) (citing 28 U.S.C. § 636(b)(1)), *cert. denied*, 519 U.S. 860 (1996); *Grinder v. Gammon*, 73 F.3d 793, 795 (8th Cir. 1996) (citing *Belk v. Purkett*, 15 F.3d 803, 815 (8th

Cir. 1994)); *Hudson v. Gammon*, 46 F.3d 785, 786 (8th Cir. 1995) (also citing *Belk*). Because objections have been filed in this case, the court must conduct a *de novo* review "of those portions of the report or specified proposed findings or recommendations to which objection is made." 28 U.S.C. § 636(b)(1). The court has done so by reviewing the record before Judge Zoss in light of Deakins's objections to Judge Zoss's Report and Recommendation.

Because *de novo* review is required of some portions of the record, the court turns next to the standard of review courts must apply to administrative decisions in Social Security disability cases. This court summarized those standards in *Wiekamp v. Apfel*, 116 F. Supp. 2d 1056 (N.D. Iowa 2000), as follows:

> The role of the courts in such a review "is to determine whether the Commissioner's findings are supported by substantial evidence on the record as a whole." *Singh v. Apfel*, 222 F.3d 448, 451 (8th Cir. 2000); *accord Wheeler v. Apfel*, 224 F.3d 891, 893-94 (8th Cir. 2000); *Burnside v. Apfel*, 223 F.3d 840, 843-44 (8th Cir. 2000); *Cunningham v. Apfel*, 222 F.3d 496, 500 (8th Cir. 2000). As the Eighth Circuit Court of Appeals recently explained,
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> > Substantial evidence is less than a preponderance, but is enough so that a reasonable mind would find it adequate to support the ALJ's conclusion. *See Cox v. Apfel*, 160 F.3d 1203, 1206-07 (8th Cir. 1998). In determining whether existing evidence is substantial, we consider "evidence that detracts from the Commissioner's decision as well as evidence that supports it." *Warburton v. Apfel*, 188 F.3d 1047, 1050 (8th Cir. 1999).
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> *Singh*, 222 F.3d at 451; *Wheeler*, 224 F.3d at 893-94; *Burnside*, 223 F.3d at 843-44; *Cunningham*, 222 F.3d at 500. Thus, under this standard of review, the court "may not reverse the Commissioner's decision merely because substantial evidence exists in the record that would have supported a contrary outcome," *Wheeler*, 224 F.3d at 894, "or because [the court] would have decided the case differently." *Burnside*, 223 F.3d

> at 843. Rather, "[t]he court is required to review the administrative record as a whole, considering evidence which detracts from the Commissioner's decision, as well as that which supports it." *Wheeler*, 224 F.3d at 894; *Burnside*, 223 F.3d at 843.

Wiekamp, 116 F. Supp. 2d at 1060-61. Subsequent decisions of the Eighth Circuit Court of Appeals apply identical standards. *See Lauer v. Apfel*, 245 F.3d 700 (8th Cir. 2001); *Gowell v. Apfel*, 242 F.3d 793, 796 (8th Cir. 2001); *Dunahoo v. Apfel*, 241 F.3d 1033, 1037 (8th Cir. 2001); *Johnson v. Apfel*, 240 F.3d 1145, 1147 (8th Cir. 2001). Therefore, this court will apply these standards in its *de novo* review of the issues identified in Deakins's objections, taking each of those objections in turn.

B. Deakins's Objections

1. The medical opinions of doctors

a. Confusion between Drs. Purves and Legarda

Deakins first contends the Judge Zoss incorrectly found in his Report and Recommendation that the ALJ did not confuse Drs. Purves and Legarda, but simply chose to give more credit to Dr. Legarda's opinions. Specifically, Deakins objects to the following statement in the Report and Recommendation:

> Deakins argues the ALJ somehow confused Drs. Purves and Legarda, and did not realize either that Dr. Purves is a neurologist, as is Dr. Legarda, or that Dr. Pruves personally examined Deakins, while Dr. Legarda based her opinions only on a review of Deakins's medical records, (See Doc. No. 10, pp. 9-11) The court does not agree. It is clear from the Record that the ALJ was not confused about these matters, but simply chose to give more credit to Dr. Legarda's opinions. (See R. 21).

Plaintiff's Objections to Report and Recommendation, Doc. No. 13 at 1.

The Commissioner argues that Judge Zoss throughly discussed the opinions of both

doctors and the ALJ's decision to give more weight to the opinion of Dr. Legarda is supported by substantial evidence in the record as a whole. Moreover, the Commissioner points out, as observed by Judge Zoss, Dr. Purves examined Deakins on only one occasion. Further, Dr. Purves stated after examining Deakins that she was not providing any treatment. (R. at 26).

This court concludes, after reviewing the record, that the ALJ did not confuse the two doctors and distinguished between Dr. Purves's and Dr. Legarda's actions by selecting particular terms such as "examination" and "evaluation." The ALJ stated specifically that Dr. Legarda conducted an "evaluation" of the claimant's condition, in comparison, she stated Dr. Purves conducted an "examination" of the claimant. Further, this court agrees with Judge Zoss that the ALJ "did not confuse Drs. Purves and Legarda, but simply chose to give more credit to Dr. Legarda's opinions." The ALJ decision to give more credit to the opinion of Dr. Legarda, a neurological consultant, and, non-treating physician, was supported by substantial evidence in the record as a whole. Dr. Legarda's evaluation was supported, not by a one-time examination of Deakins, but by the medical reports and opinions of Drs. Sharma, Baker, Donohoe, and Piepergedes. Each of these doctors examined Deakins on more than one occasion.

Dr. Legarda considered Dr. Sharma's opinion, including the following:

> The jerking is mentioned in her prior file, on one exam in 5-89 by Dr. Sharma, who noted mild clonic type of jerks in arms and legs. Before the exam, however, they were not there, but when the exam started they began. Numerous examines by physicians, mostly psychiatrist, and other mental health professionals whom she has been treated by over the years, have not mentioned seeing myoclonic jerks. The discharge summary of a 2 year stay in an inpatient psych treatment center in Iowa made no mention of myoclonic jerks.

(R. at 171). Dr. Legarda's evaluation comments referred to Dr. Baker's examination notes, stating:

> In 3-99 during the administration of WAIS-R test by Dr. Baker, fine hand motor shakiness was noted when she did the block design subtest.

(R. at 171). In addition, Dr. Legarda's evaluation comments included a discussion of Dr. Donohoe's medical examination, noting:

> CE neurologist Dr. Donohoe 6-6-00: This patient is able to walk, stand, sit handle objects and speak. Her handwriting would be i[m]paired bec. of the myoclonic jerking. I would suggest that her most prominent clinical finding that would impair her ability to function are these myoclonic jerks involving her arm and leg. This statement is given considerable weight, since Dr. Donohoe is a specialist and his is the only primary neuro exam in the chart. . . . After reviewing all the evidence, clmts.'s allegations of myoclonic jerks are only partially credible. She does appear to have them, but it is very difficult to reconcile the fact that less than one month prior to Dr. Donohoe's exam, which the clmt. knew was specifically for evaluation of the jerking, she had a one -hour psych exam and her doctor observed no abnormal movements, yet when Dr. Donohoe saw her, she had them continuously, and Dr. Donohoe himself stated in his report that this was very unusual. He told me in RC he could not tell whether the jerks were real or feigned. She also is not on medication or other treatment for the jerking.

(R. at 172-73). Further, Dr. Legarda considered the examination of Dr. Piepergedes:

> During a one hour session at Tricounty Mental Health clinic on 5-10-00 [treating physician] psychiatrist Dr. Piepergedes stated he saw no abnormal motor movements.

(R. at 173).

Although, ordinarily, the opinions of doctors who have not examined the claimant do not constitute substantial evidence on the record as a whole, *see Bowman v. Barnhart*, 310 F.3d 1080, 1087 (8th Cir. 2002), in this circumstance the opinion of the non-examining doctor was based on the medical records and opinions of doctors who had examined the

claimant. In addition the ALJ in this case considered all the evidence in the record as a whole. The ALJ correctly gave less weight to the opinion of Dr. Purves who personally examined Deakins on only one occasion.[1] This court finds that the ALJ did not confuse Dr. Purves, who examined Deakins on one occasion, and Dr. Legarda, who evaluated Deakins's medical records. Further, Dr. Legarda's opinion was supported by substantial evidence in the record as a whole. Therefore, Deakins's objection as to this issue is overruled.

b. Dr. Purves's qualifications

Deakins argues that Judge Zoss incorrectly found that Dr. Purves was not qualified to express opinions about intellectual functioning and psychiatric condition because these areas were outside of Dr. Purves's area of expertise. The court notes that even if Dr. Purves was qualified to opine on Deakins's intellectual functioning and psychiatric condition, the ALJ did not give weight to Dr. Purves's one-time examination of Deakins because her opinion was directly contradicted by the opinions of nearly all of the other physicians, treating and non-treating, who examined or evaluated Deakins. Deakins argues that Judge Zoss is attempting to help the ALJ find a reason to discount Dr. Purves.

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[1] Deakins also argues that the Report and Recommendation appears to state that Deakins is arguing that Dr. Purves was a treating physician when this was not her argument. Deakins states in her brief that her argument is that Dr. Legarda's final opinion cannot constitute substantial evidence because Dr. Legarda based her opinion only on a review of medical records, not that Dr. Purves's opinion should be given more weight because she was a treating physician. The Report and Recommendation does include a discussion of treating and non-treating physician opinions. This discussion provided the legal authority and explanation as to why Dr. Purves's opinion was not given as much weight as Dr. Legarda's opinion, which was supported by the opinions of treating doctors.

Considering the record before this court, the ALJ does not need assistance from Judge Zoss to discount Dr. Purves's opinion, because, even assuming Dr. Purves was qualified to express such opinions — there was substantial evidence in the record as a whole to support the ALJ's decision to discount Dr. Purves's opinion.

Dr. Purves's opinion was entitled to less weight because she examined Deakins on only once occasion. As recently stated by the Eighth Circuit Court of Appeals, "The amount of weight given to a medical opinion is governed by a number of factors including the examining relationship, the treatment relationship, consistency, specialization, and other factors." *Shontos v. Barnhart*, 328 F.3d 418, 426 (8th Cir. 2003). "The regulations provide that the longer and more frequent the contact between the treating source, the greater the weight will be given the opinion." *Id.* Therefore, even if Dr. Purves would have been qualified to express opinions on Deakins's intellectual functioning and psychiatric condition, the opinions of other treating and non-treating physicians, which supported Dr. Legarda's opinion, outweighed Dr. Purves's opinion. The court does not need to reiterate here the discussion contained in the Report and Recommendation regarding Deakins's medical history and physicians' opinions. *See* Report and Recommendation, Doc. No. 12 at 5-16. As previously acknowledged by the Eighth Circuit Court of Appeals, "[e]ven assuming that Dr. [Purves] was the treating physician [and she was qualified to opine on Deakins's condition], [her] opinion is not entitled to substantial weight if it is inconsistent with other substantial evidence in the record." *Dunahoo*, 241 F.3d at 1038 n.2 (citing *Kelley v. Callahan*, 133 F.3d 583, 589 (8th Cir. 1998)); *Hogan*, 239 F.3d 958, 961 (8th Cir. 2001) ("The ALJ may discount or disregard [a physician's] opinion if other medical assessments are supported by superior medical evidence, or if the treating physician has offered inconsistent opinions."). Such is the case here. Dr. Legarda's medical assessment is supported by superior medical evidence. Moreover, "'[i]t is the ALJ's function to resolve conflicts among "the various treating and examining physicians."'" *Johnson*, 240 F.3d at

1148 (quoting *Bentley v. Shalala*, 52 F.3d 784, 785 (8th Cir. 1995), in turn quoting *Cabrnoch v. Bowen*, 881 F.2d 561, 564 (8th Cir. 1989)).

The ALJ rejected Dr. Purves's opinion for the following reasons:

> The undersigned is aware of the opinion expressed by Dr. Purves that the claimant i[s] unable to work but gives little weight to this opinion. [She] based [her] opinion on the numbers of doctors she has seen and also the number of medications that had been tried without success. (Exhibit 13F) However a full neurological evaluation of the claimant done by Maria M. Legarda, M.D., a neurologist, indicates that the claimant has but a few moderate limitations in her ability to function. (Exhibit 6F) The undersigned has given the opinion of Dr. Legarda significant weight in arriving at the residual functional capacity discussed below.

(R. at 21). The ALJ discussed the opinion of Dr. Muller, D.O., a psychiatrist, who was a treating physician and saw Deakins on at least four occasions from June 4, 2001 to July 31, 2001. The ALJ stated in her decision the following:

> The objective medical evidence and the opinions expressed by her treating physicians do not support her allegations. Dr. Muller reported that the claimant did have some involuntary movements but that on several occasions he noted that her tic disorder looked better. On June 28, 2001 Dr. Muller indicated that her mood disorder appeared better and her affect appeared to be improved and there was no psychosis present (Exhibit 15F) . . . It is clear to the undersigned that the claimant has had a significant history of psychiatric problems as a young child, but that her condition has improved and she now experiences only moderate difficulties in a few areas of functioning. It appears that according to Dr. Muller, she has reacted well to her medication regimen and does have the ability to function in the workplace. It is also noted that on many occasions when seeing her doctors and also at the hearing, the claimant's tics were not evident.

(R. at 21). Since a treating physician's opinion may be disregarded if it is inconsistent with

other substantial evidence in the record as a whole, *see Dunahoo*, 241 F.3d at 1038 n.2; *Johnson*, 240 F.3d at 1148; *Hogan*, 239 F.3d at 961, then it is certain that a non-treating physician's opinion may be disregarded if it is inconsistent with other substantial evidence in the record as a whole. Therefore, Dr. Purves's opinion certainly can be disregarded because it was contrary to and inconsistent with the objective medical evidence derived from treating physicians and consulting specialists. The ALJ need not give weight to the opinion of a non-treating physician who examined Deakins one time. In short, even assuming Dr. Purves was qualified to give her opinions regarding Deakins's intellectual functioning and psychiatric condition, here, the ALJ properly disregarded Dr. Purves's opinions on the grounds that they were inconsistent with other substantial evidence in the record as a whole. *See Dunahoo*, 241 F.3d at 1038 n.2; *Johnson*, 240 F.3d at 1148; *Hogan*, 239 F.3d at 961. Deakins's objection as to this issue will consequently be overruled.

c. Dr. Brown

Deakins contends that the ALJ erred by giving treating psychiatrist, Dr. Brown, who evaluated Deakins and rated her Global Assessment of Functioning at 75/40, indicating "minimal symptoms and only slight impairments," significant weight. Deakins contends that Dr. Brown "noted a history of mood swings, depression, hearing things, seeing things, poor attention span, explosive anger outbursts, and easily frustrated, and diagnosed Bipolar disorder" which would be contrary to a Global Assessment of Functioning marking of 75/40. Deakins asserts that Judge Zoss neglected to consider the ALJ's error as to Dr. Brown and only refers briefly to Dr. Brown in the Report and Recommendation. Deakins argues that any reliance the ALJ or Judge Zoss placed on Dr. Brown's opinion as support for the ALJ's determination of RFC would be incorrect on this record. Plaintiff's Objections to Report and Recommendation, Doc. No. 13 at 3. The Commissioner responded that Judge Zoss properly considered the ALJ's decision and the opinion of Dr. Brown.

Although Deakins is correct that Dr. Brown noted a "history" of identified problems,

this "history" is not, necessarily, representative of current problems or a claimant's current residual functional capacity. The ALJ discussed in detail the medical findings of each treating and non-treating doctor. (R. 15-18). The court acknowledges that Dr. Brown's medical notes are not as detailed in comments as some of the other physicians, however, Dr. Brown did mark Axis V "75/40." (R. at 199). The ALJ considered and interpreted this mark, "On January 1, 2001, Dr. Brown, her psychiatrist, indicated that her GAF was 75 which would indicate minimal symptoms and only slight impairments in social, occupational, or school functioning. (R. at 21). The ALJ considered all of the opinions expressed by Deakins's treating physicians, not just Dr. Brown's opinion. In addition, contrary to Deakins's objection, Judge Zoss did discuss Dr. Brown's opinion. Report and Recommendation, Doc. No. 12 at 31. Considering the length of Dr. Brown's medical report, an extensive discussion of that opinion is not required. It is evident to this court, from both the ALJ's decision and from Judge Zoss's Report and Recommendation, that the ALJ's determination of Deakins's residual functional capacity relied on more than Dr. Brown's opinion. The ALJ considered Dr. Muller's opinion, for example:

> It is clear to the undersigned that the claimant has had a significant history of psychiatric problems as a young child, but that her condition has improved and she now experiences only moderate difficulties in a few areas of functioning. It appears that, according to Dr. Muller, she has reacted well to her medication regimen and does have the ability to function in the workplace. It is also noted that on many occasions when seeing her doctors and also at the hearing, the claimant's tics were not evident.

(R. at 21). Moreover, Judge Zoss found, "The only evidence to suggest Deakins has greater restrictions is in the August 10, 2001, report of Dr. Purves, which was discounted by the ALJ. . . ." Report and Recommendation, Doc. No. 12 at 25. Dr. Brown's opinion supports the ALJ's decision. There is no indication that the ALJ relied exclusively on Dr. Brown's opinion when she determined Deakins's residual functional capacity. Further, even

if Dr. Brown's opinion would have been completely ignored, there was still substantial evidence in the record as a whole to support the ALJ's decision. Therefore, Deakins's objection as to this issue is also overruled.

d. Dr. Muller

Deakins argues that the ALJ erred because she failed to develop the record from Deakins's treating psychiatrist, Dr. Muller. Deakins contends that this error is "nearly identical" to the facts in *Bowman v. Barnhart*, 310 F.3d 1080 (8th Cir. 2002), where the court, in that case, determined that a claimant's residual functional capacity should be formulated based upon an examining doctor's opinion and if the examining doctor's notes are "cursory" the ALJ is obligated to contact the treating physician for additional evidence and clarification and not rely on a state consultant's report. Deakins asserts that "just as in *Bowman*," Dr. Muller's notes were cursory and that the ALJ erred when she failed to seek further information from a treating source and relied on the opinion of a non-examining physician. However, Deakins's case is distinguishable from *Bowman* in two ways. First, the court does not find that Muller's notes were cursory. Second, in Deakins's case there were opinions of other examining doctors in the record available to the ALJ that constituted substantial evidence on the record as a whole.

The court notes that Deakins's argument is confusing in that Deakins's brief reveals that she appears to have confused who was or was not an examining physician:

> The third mistake is one that is nearly identical to the facts in Bowman v. Barnhard, 310 F.3rd 1080 (8th Cir., 2002), where the Court stated, "Instead of developing the record from Dr. Plunk, in assessing Bowman's residual functional capacity, the ALJ improperly relied on the report of a state consultant, who did not examine Bowman." Here, the ALJ has done exactly the same, instead of developing the record from Deakins's treating Psychiatrist, Dr. Muller. Just as in Bowman, Dr. Muller's cursory notes demonstrate little about what her remaining mental functional capacity is, and the ALJ ought to

> have sought the treating source opinion rather than just relying on the non-examining consultant's view.

Plaintiff's Objections to Report and Recommendation, Doc. No. 13 at 5-6. It is clear to this court that Dr. Muller was a treating physician and that the ALJ did develop the record from Dr. Muller's opinion. (R. at 237-41). And a review of the record does not support the conclusion that Dr. Muller notes were "cursory." Dr. Muller clearly examined and opined on Deakins's mental functional capacity:

> MENTAL STATUS EXAM: . . . She is alert and oriented times 3. She is 3 out of 3 at 0, 2 out of 3 at 5. She is able to spell words forwards and backwards. She is concrete. She knew Bush, Clinton, Bush and Reagan out of the last five presidents. She had indicted she has a lot of problems with concentration at times and attention.

(R. at 238). Dr. Muller noted:

> Her mood disorder actually appeared to be better today initially, but she doesn't think there has been any change with it. . . . Affect appears to be improved, though.

(R. at 240). Dr. Muller's medical records stated further:

> Her mood - she says she still has some problems with her depression and affect, again, appears to be improved some today. No suicide or homicide ideation. She indicates some paranoia. Again, she say[s] the tic disorder isn't any better, but certainly she doesn't appear to be having the problem with the tic disorder today when she is in my office.

(R. at 241). The above are only excerpts from Dr. Muller's notes. It is apparent to this court that Dr. Muller did not provide comments as to Deakins's ability to function. Further, the record contains other examining physician opinions that support Dr. Muller's opinions. It is clear from the ALJ's decision that she did not "rely" on the report of a state consultant. The ALJ decision includes a discussion of a number of physicians' reports, in addition to the state consultant. The ALJ considered the opinions of Drs. Baker, Flowers,

Piepergerdes, Donohoe, Brown, Ahmed, Purves, Muller, Legarda, and Sanchez. The ALJ reiterated the opinions of Drs. Muller, Brown and Legarda in her decision and explained why she was giving less weight to the opinion of Dr. Purves. The court cannot conclude, as advanced by Deakins, that the ALJ based Deakins's residual functional capacity only on the state examining officer and should have sought additional clarification from Dr. Muller. A review of the record and the ALJ's decision, in fact, supports the opposite conclusion. The ALJ considered the entire record in this case when determining the residual functional capacity of Deakins. Both treating and non-treating physicians' opinions were considered. In addition, from May through July 2001, Deakins was examined and treated by Dr. Muller, who never diagnosed Deakins as being permanently disabled. In fact, as noted by Judge Zoss, none of the other doctors' opinions, with the exception of Dr. Purves, supported a finding that Deakins was permanently disabled. Dr. Muller's opinion was considered along with the evidence as a whole, and was supported by other substantial evidence. *see Singh v. Apfel*, 222 F.3d 448, 452 (8th Cir. 2000) (stating that if a treating physician's opinion is well-supported by acceptable clinical techniques and not inconsistent with the other substantial evidence in the record, the opinion should be given controlling weight). Therefore, Deakins's objection as to this issue is overruled.

2. Credibility

The Eighth Circuit Court of Appeals has cautioned that "[t]he ALJ is in the best position to determine the credibility of the testimony and is granted deference in that regard." *Johnson*, 240 F.3d at 1147 (citing *Polaski v. Heckler*, 739 F.2d 1320 (8th Cir. 1984)). Therefore, courts "'will not disturb the decision of an [ALJ] who seriously considers, but for good reasons explicitly discredits, a claimant's testimony of disabling pain.'" *Id.* at 1148 (quoting *Pena v. Chater*, 76 F.3d 906, 908 (8th Cir. 1996), in turn quoting *Browning v. Sullivan*, 958 F.2d 817, 821 (8th Cir. 1992)).

As the Eighth Circuit Court of Appeals has explained,

> In analyzing a claimant's subjective complaints, such as pain, an ALJ must consider: (1) the claimant's daily activities; (2) the duration, frequency, and intensity of the condition; (3) dosage, effectiveness, and side effects of medication; (4) precipitating and aggravating factors; and (5) functional restrictions. *Black v. Apfel*, 143 F.3d 383, 386 (8th Cir. 1998) (factors from *Polaski v. Heckler*, 739 F.2d 1320, 1322 (8th Cir. 1984)). "Other relevant factors include the claimant's relevant work history and the absence of objective medical evidence to support the complaints." *Id.* As we have often stated, "there is no doubt that the claimant is experiencing pain; the real issue is how severe that pain is." *Woolf v. Shalala*, 3 F.3d 1210, 1213 (8th Cir. 1993) (quoting *Thomas v. Sullivan*, 928 F.2d 255, 259 (8th Cir. 1991)). We will not disturb the decision of an ALJ who considers, but for good cause expressly discredits, a claimant's complaints of disabling pain, even in cases involving somatoform disorder. *Reed v. Sullivan*, 988 F.2d 812, 815 (8th Cir. 1993); *Metz v. Shalala*, 49 F.3d 374, 377 (8th Cir. 1995).

Gowell, 242 F.3d 793, 796 (8th Cir. 2001); *see also Dunahoo*, 241 F.3d at 1038 (also identifying the "*Polaski* factors" for analyzing subjective pain complaints); *Hogan v. Apfel*, 239 F.3d 958, 961-62 (8th Cir. 2001) (also identifying the "*Polaski* factors").

An ALJ meets his or her burden to demonstrate grounds for disregarding subjective complaints where the ALJ articulates the inconsistencies in the record as a whole. *Johnson*, 240 F.3d at 1149; *see also Dunahoo*, 241 F.3d at 1338 ("The ALJ may discount complaints of pain if they are inconsistent with the evidence as a whole."); *Hogan*, 239 F.3d at 962 (same). Moreover, "[i]f the ALJ discredits a claimant's credibility and gives a good reason for doing so, we will defer to its judgment *even if every [Polaski] factor is not discussed in depth*." *Dunahoo*, 241 F.3d at 1338 (emphasis added) (finding further that the ALJ's decision was adequate where "[t]he ALJ recited the five *Polaski* factors and detailed the relevant evidence"); *Hogan*, 239 F.3d at 962. "Any arguable deficiency . . . in the ALJ's opinion-writing technique does not require the Court to set aside a finding that is supported by substantial evidence." *Johnson*, 240 F.3d at 1149. With the Eighth Circuit's rulings as

a guide, the court now considers Deakins's objections regarding Judge Zoss's finding that, "the court cannot find the ALJ's credibility determination was not supported by substantial evidence in the Record." Report and Recommendation, Doc. No. 12 at 26.

a. ALJ's personal observations during hearing

Deakins objects to Judge Zoss's finding that the ALJ did not err when she considered the claimant's "demeanor" at the administrative hearing. Deakins contends that Judge Zoss may have been "suggesting" that the ALJ could personally observe whether or not certain symptoms appeared during the hearing and could use that observation to determine credibility regarding the medical condition involved. Deakins argues that the Eighth Circuit Court of Appeals has found that an ALJ cannot use her personal observations of symptoms during a hearing to determine credibility. In support of her argument, Deakins refers the court to *Shonots v. Barnhard*, 328 F.3d 418 (8th Cir.) and *Lund v. Weinberger*, 520 F.2d 782, 785 (8th Cir.). The Commissioner contends that the ALJ noted in her decision that Deakins did not exhibit her alleged jerking symptoms during the hearing and that this symptom would have been observed, if it occurred, at the hearing by the ALJ. Further, the Commissioner argues that Judge Zoss made the correct finding that it is not error for the ALJ to consider a claimant's demeanor at an administrative hearing and this finding is supported by the Eighth Circuit Court of Appeals which has found that it is appropriate for an ALJ to consider personal observations made during hearings when determining the credibility of the claimant. *See Johnson v. Apfel*, 240 F.3d 1145, 1147-48 (8th Cir. 2001). The Commissioner argues that in assessing Deakins's testimony "[T]he credibility of the claimant is important in evaluating the subjective complaints of impediments." *Johnson*, 240 F.3d at 1148.

This court has reviewed *Shonots* and *Lund* and finds that neither of these cases are persuasive, as asserted by Deakins, for the proposition that an ALJ cannot personally

observe whether or not certain symptoms appeared during a hearing and then use that observation to determine credibility regarding the medical condition involved. Contrary to Deakins's assertion, the Eighth Circuit Court of Appeals has allowed personal observations of alleged symptoms during a hearing before an ALJ, when combined with medical records, to determine the credibility of the claimant, for example:

> [S]ubjective complaints may not be discredited solely on the basis of an ALJ's personal observation of the claimant at the hearing. *Id.* In the instant case, however, the ALJ gave full consideration to [claimant's] complaints in the context of the remaining evidence in the record and concluded that they were not credible. . . . The ALJ also noted that his own observations of [claimant] (i.e., that [claimant] had no apparent problem walking, sitting, standing, concentrating, remembering, or attending to his surroundings during the hearing) was a factor. However, the ALJ also discussed the existing objective medical evidence in detail. Clearly, inconsistencies existed among that evidence, the various physicians' interpretations of that evidence, and [claimant's] subjective complaints. Subjective complaints may be discounted where, as here, there are inconsistencies in the evidence as a whole. *Id.*; *see also Conley v. Bowen*, 781 F.2d 143, 146-47 (8th Cir. 1986) (per curiam).

Ward v. Heckler, 786 F.2d 844, 847-48 (8th Cir. 1986); *see also Jelinek*, 764 F.2d at 509-10 (quoting *Polaski*, 739 F.2d at 1322) (stating "the adjudicator is not free to accept or reject the claimant's subjective complaints solely on the basis of personal observations," such complaints "may be discounted if there are inconsistencies in the evidence as a whole). The case before the court is similar to *Ward*. The ALJ found that Deakins's allegations regarding her limitations "were not totally credible." The ALJ's decision reflects that it was the objective medical evidence combined with the ALJ's observations during the hearing that persuaded the ALJ that Deakins was not credible. (R. at 20-21). One such observation made by the ALJ was, "It was also noted that on many occasions when seeing

her doctors and also during the hearing, the claimant's tics were not evident." (R. at 21). A review of the record reveals, for example, none of the medical progress notes taken while Deakins was pregnant and under a physician's prenatal care indicate any jerking or tics. (R. at 178-87). During a real-time sonography, the medical notes indicate no jerking or tics. (R. at 188). Dr. Ahmend's medical notes reflect that Deakins reported that "whenever someone comes close to her she gets jerking movements of the left side, otherwise she has no problem" but he did not report seeing the reported jerks or tics only that Deakins reported having them. (R. at 197). The medical evidence from Dr. Flowers's notes indicates that Deakins's medical history indicates jerking but no report of seeing jerking or tics. (R. at 136-40). In addition, Dr. Piepergerdes noted Deakins was taking no medications for the reported jerking when he began treating her. (R. at 149). When a 21 channel EEG was performed on Deakins the medical notes indicated no jerking or tics during the procedure. (R. at 202). Dr. Muller's medical records indicate that after he adjusted her medication, he opined her tics were getting better and that she did not appear to have problems with her tics when in Dr. Muller's office on July 31, 2001. (R. at 239, 241). Dr. Muller also noted that Deakins reported that she feels the medications prescribed by Dr. Muller were helping her some. (R. at 240).

Deakins's argument, which focuses on the word "demeanor" and that there is "no mention anywhere in the record that suggests anything about Deakins's "demeanor" playing a role in the ALJ's decision, is simply too narrow of an argument. Deakins is correct when she states Judge Zoss found that, "the ALJ was entitled to consider her personal observations of Deakins's demeanor in making credibility determinations." And though this court would have further clarified that an ALJ's personal observations are not limited to demeanor, but may include observations regarding demeanor, or any apparent problem walking, sitting, standing, concentrating, remembering, or attending to surroundings, or tics, *see Ward v. Heckler*, 786 F.2d at 848, Judge Zoss is correct in his finding. When rendering

a judgment on subjective symptoms, the personal observations of the ALJ take on an additional importance. How a claimant speaks, walks, behaves or even if there are apparent tics, that are claimed to occur when the claimant gets nervous, goes a long way to prove whether or not the claimant is credible. In addition, the ALJ explained in her decision that she considered the objective medical evidence, her personal observations during the hearing and Deakins's testimony. This court does not intend to prohibit ALJs from considering observations made during hearings. If, as in Deakins's case, the ALJ combines both objective medical evidence with observations made during a hearing and determines the claimant is not credible, the court cannot find that there is any error. Therefore, Deakins's objection as to this issue is overruled.

b. Daily activities

Deakins states that she fails to understand the point of the section discussing her daily activities contained in the Report and Recommendation since both Deakins and Judge Zoss agree that it would be wrong for the ALJ to require proof that the claimant is bedridden in order to be awarded benefits. Deakins argues that the specific facts at issue, *i.e.*, that she is able to clean, shop, care for her child with help and wants to work, do not demonstrate that she would be able to perform substantial gainful activity. Deakins argues that the ALJ erred when she found that Deakins's daily activities were different than those of a disabled person. The Commissioner argues that it is proper for the ALJ to consider Deakins's daily activities as part of the credibility analysis and, further, the Commissioner argues that, although daily activities alone do not disprove disability, they are a factor to consider in evaluating the subjective complaints of the claimant.

As noted by Judge Zoss in his Report and Recommendation, "under the facts of this case, it was not inappropriate for the ALJ to consider these facts [daily activities] as part of the *Polaski* analysis." In fact, if an ALJ is conducting an analysis of a claimant's subjective complaints she is required to consider the daily activities of the claimant:

> In analyzing a claimant's subjective complaints, such as pain, an ALJ must consider: (1) the claimant's daily activities; (2) the duration, frequency, and intensity of the condition; (3) dosage, effectiveness, and side effects of medication; (4) precipitating and aggravating factors; and (5) functional restrictions.

Black v. Apfel, 143 F.3d 383, 386 (8th Cir. 1998) (factors from *Polaski v. Heckler*, 739 F.2d 1320, 1322 (8th Cir. 1984)). The ALJ noted that Deakins's daily activities are inconsistent with her subjective complaints:

> The undersigned has also given significant consideration to the claimant's testimony that she is able to care for her daughter on a daily basis, visits with a friend, and would be willing to try to work. The claimant also indicates she wants to work and is willing to try anything. These claims are significantly different from those of an individual who alleges a total inability to work.

(R. at 21). The ALJ concluded that these activities were simply inconsistent with Deakins's alleged claim that she is not able to work. An ALJ meets his or her burden to demonstrate grounds for disregarding subjective complaints where the ALJ articulates the inconsistencies in the records as a whole. *Johnson*, 240 F.3d at 1149. Moreover, "[i]f the ALJ discredits a claimant's credibility and gives a good reason for doing so, we will defer to its judgment even if every [*Polaski*] factor is not discussed in depth." *Dunahoo*, 241 F.3d at 1338. In the context of this case, it was proper for the ALJ to consider Deakins's daily activities. The ALJ properly considered Deakins's daily activities as part of the *Polaski* analysis and concluded Deakins was not credible. Subjective complaints may be discounted if there are inconsistencies in the record as a whole. *See Polaski v. Heckler*, 739 F.2d 1320, 1322 (8th Cir.1984). The court concludes that the ALJ's finding that Deakins was not credible is supported by substantial evidence in the record as a whole. Therefore, Deakins's objection as to this issue is overruled.

c. Attention span

Deakins contends that Judge Zoss stated that there is nothing in the record to indicate that a short attention span would be disabling and adds that she hopes this is some type of clerical error. Deakins argues that she has a functional limitation as to her ability to maintain attention. Deakins argues that a vocation expert presented with this limitation combined with her other alleged limitations would find that she is disabled under the rules. The Commissioner argues that Judge Zoss concluded that the record did not support a claim that "boredom" or "short attention span" would be disabling *in this case*. Report and Recommendation, Doc. No. 12 at 26. Further, the Commissioner points out that the limitation was included in the residual functional capacity and considered by the vocational expert during the hearing.

The record indicates that Deakins described her "short attention span" as "boredom." The record includes the following exchange between the ALJ and Deakins:

> Q. - - So, even though you know what to do, they've taught you what to do, and you want to do it, it just doesn't happen that you're able to get it done?
>
> A. I just don't - - I just - - I get bored with it. I get too bored. I can't concentrate on just one thing.
>
> Q. All right. So, you get bored, and you want to do something else?
>
> A. Right.

(R. at 54). Boredom does not equate to a recognized impairment. However, the ALJ did determine that Deakins was moderately limited in her ability to maintain attention and concentration for extended periods and included this finding in the residual functional capacity assessment and the vocational expert considered this limitation.[2] (R. 61). The

[2] "And I would also ask that you restrict jobs to the unskilled level, at the SVP 1 (continued…)

vocational expert found that Deakins would be able to perform work as a janitor, cleaner, laundry worker. (R. at 62).

There is no error in Judge Zoss's determination that "Deakins testified she likely would get "bored" and have a short attention span while working at such a job. There is nothing in the record to support a claim that boredom or a short attention span would, in the circumstances of this case, be disabling." Report and Recommendation, Doc. 12 at 26. Judge Zoss is not saying, as Deakins attempts to argue, that a short attention span can never be a functional limitation. Judge Zoss's finding was that, in the circumstances of Deakins's case, a short attention span is not disabling. In addition, Deakins's argument fails because the ALJ did include a short attention span as part of Deakins's residual functional capacity and it was considered in the hypothetical presented to the vocational expert. Judge Zoss correctly found that there was nothing in this record to indicate that Deakins's short attention span, which was included as a limitation and considered by the VE, would be disabling. Therefore, as to this issue, Deakins's objection is overruled.

III. CONCLUSION

Upon *de novo* determination of those portions of the Report and Recommendation, or specified proposed findings or recommendations to which Deakins has made objections, *see* 28 U.S.C. § 636(b)(1), the court finds that Deakins's objections must be **overruled**. Therefore, the May 1, 2002, Report and Recommendation by Magistrate Judge Paul A. Zoss concerning disposition of this matter is **accepted**. *see* 28 U.S.C. § 636(b)(1) ("A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate [judge].") — and **judgment shall enter in favor**

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[2](…continued)
or 2 level, due to a moderate limitation and ability to maintain attention and concentration for extended periods of time, or to carry out and remember detailed work." (R. at 61).

of the Commissioner and against Deakins in this action.

IT IS SO ORDERED.

DATED this 6th day of August, 2003.